Editor's note: Reconsideration denied by Order dated Sept. 19, 1989

DORIS SLAATEN

IBLA 87-299 Decided January 25, 1989

Appeal from a decision of the Montana State Office, Bureau of Land Management, dismissing protest challenging allocation of compensatory royalty to United States under agreement. Montana 047493.

Reversed.

1. Acquired Lands--Conveyances: Reservations--Mineral Lands: Mineral Reservation--Oil and Gas Leases: Compensatory Royalty--Public Lands: Generally

   Where land has been conveyed to the United States reserving to the grantors the exclusive right to prospect for and exploit the oil and gas underlying the land and that reservation has been extended beyond its initial term by production, in accordance with the terms of the deed, the United States has, during the extended term, no interest in any of that oil and gas sufficient to form the basis for claiming compensatory royalty because of drainage.

APPEARANCES: Doris Slaaten, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Doris Slaaten has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated January 16, 1987, dismissing her protest challenging the allocation of compensatory royalty to the United States under a November 4, 1961, agreement between Texaco, Inc. (Texaco), and the United States.

The particular land involved in this case, described as 160 acres situated in the NW^ sec. 17, T. 153 N., R. 95 W., fifth principal meridian, McKenzie County, North Dakota, within the Custer National Forest, was originally reconveyed to the United States by warranty deed dated May 25, 1937, from Maude L. and Alfred Slaaten, the parents of Doris Slaaten. The deed expressly reserved to the sellers and their heirs, successors, and assigns the "exclusive right to prospect for and exploit the following minerals only: GAS, OIL, in, under and upon [the land conveyed]," which right was to expire on November 4, 1961. The deed also provided for auto-matic extensions of such right for successive periods of 5 years each, provided that an authorized officer "shall determine, prior to the expiration of any such period, that the Seller has mined minerals in the exercise of

said right to commercial advantage for an average of at least two hundred (200) days per year during each year of the next preceding period." In the absence of satisfaction of this condition precedent, the deed provided that the extended right would "absolutely terminate." However, even in the case of an extension, the deed restricted the exercise of such right during any extended 5-year period, providing initially that "[i]n the event of the first extension of said right, its exercise by Seller shall be limited to an area of twenty-five (25) acres of land around each well or mine producing, or being drilled or developed at the time of termination of said right." In the case of subsequent extensions, the deed provided that the exercise of the right would be limited to "an area of twenty-five (25) acres of land around each well or mine producing at the time of the termination of the next preceding extension of said right."

Thereafter, during the initial term of the reserved oil and gas interest, Maude L. Slaaten, a widow, by private agreement dated April 28, 1948 (ND-129-A), leased the subject land to Thomas G. Dorough for oil and gas purposes, retaining an overriding royalty interest of 1/8 or 12-1/2 percent of the value of oil and gas produced from that land. The lease was for a term of 10 years and so long thereafter as oil or gas was produced or other conditions were satisfied. On November 1, 1948, Dorough assigned the lease to the Texas Company (now Texaco).

Texaco subsequently completed two oil and gas wells on the subject land on March 1, 1954 (the M.L. Slaaten No. 1 well situated in the NW^ NW^ sec. 17) and December 6, 1955 (the Slaatten-Boots No. 1 well situated in the SE^ NW^ sec. 17), which wells thereafter produced from the Madison formation until, respectively, the second half of 1967 and the end of January 1978. As a result of applicable orders issued by the North Dakota Industrial Commission after completion of the first well by Texaco, which orders provided for 80-acre spacing between wells completed in the Madison formation, the drilling of additional wells within the subject land was precluded. On May 31, 1966, the Acting Director, Geological Survey, approved the Charlson-Madison (North) Unit Agreement (No. 14-08-0001-8777), encompassing land subject to oil and gas leases situated in McKenzie and Williams Counties, North Dakota, including the subject land.

Thereafter, recognizing that the United States would become vested with an indeterminate oil and gas interest in the subject land on November 4, 1961, pursuant to the terms of the May 1937 warranty deed, and thus would be entitled to some compensation for drainage by Texaco's wells, Texaco, on August 23, 1961, proposed that the United States "accept a proportionate share of the landowners royalty as compensation." On October 30, 1961, Texaco submitted a proposed compensatory royalty agreement, under which Texaco would pay to the United States a "proportionate share of all of the oil and gas produced and saved from, or allocable to, the above-described land from and after November 4, 1961," and requested execution by the United States. Texaco argued that the agreement represented a fair and equitable resolution of any entitlement of the United States which would arise upon the vesting of the oil and gas interest on November 4, 1961, thereby avoiding any litigation which would only delay Texaco's production of the subject wells to the detriment of all interested parties. Texaco also argued that

the very indeterminate and questionable nature of the oil and gas interest and the preclusion of further drilling within the subject land indicated the unlikelihood of the United States ever leasing that interest.

By decision dated January 4, 1962, BLM accepted a modified compensa-tory royalty agreement, noting that, while the oil and gas reservation had been extended for 5 years from November 4, 1961, "as to 25 acres surrounding each [of the two producing] well[s]," the United States had acquired a "present interest in the oil and gas in the remaining 110 acres of the 160-acre tract" and that the agreement was regarded as "adequately pro-tecting the interest of the United States in the subject oil and gas deposits." The compensatory royalty agreement was given serial number Montana 047493 and was executed by the United States and Texaco effective November 4, 1961.

Under the compensatory royalty agreement, for the period from November 4, 1961, until the termination of the oil and gas reservation, Texaco agreed to pay the United States as compensation for all drainage "from the interest of the United States" in the Madison formation under-lying the NW^ sec. 17, a "proportionate share of all oil and gas produced, saved, and marketed from said tract or which may be allocated to said tract, or a portion thereof." The proportionate share was identified as fractional portions of 12-1/2 percent of the value of production from the two producing wells within the subject land and the Government-Dorough-M.L. Slaatten Unit No. 1 well situated in the SE^ SW^ sec. 8, T. 153 N., R. 95 W., fifth principal meridian, McKenzie County, North Dakota, which land had been communitized with the NE^ NW^ sec. 17. With respect solely to the NW^ sec. 17, the United States' share was set at 110/160 of 12-1/2 percent of the value of oil and gas produced from that land. The 110/160 figure represented that percentage of the oil and gas in the subject land which had vested in the United States on November 4, 1961, excluding the two 25-acre tracts of land surrounding the producing wells. In addition, the agreement provided that the United States would not issue any oil and gas leases within the subject land with respect to oil and gas in the Madison formation. 1/

The effect of the compensatory royalty agreement was to immediately decrease the total amount of royalty paid to the existing royalty owners under private lease ND-129-A, including Maude L. Slaaten who had retained an overriding royalty interest, by the amount of compensatory royalty paid to the United States. Finally, on July 11, 1968, Maude L. Slaaten voiced

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1/ The record indicates that BLM subsequently issued a competitive oil and gas lease (M-63948 (ND) Acq.), covering the NW^ sec. 17, to the Amerada Hess Corporation, effective May 1, 1985. However, the lease expressly excluded from leasing not only 25 acres surrounding each of the two producing wells within that land but also the "Madison Formation which is subject to Compensatory Royalty Agreement MONTANA 047493 (ND)." This lease was apparently issued as a basis for permitting production from other forma- tions underlying the subject land and, thus, for protecting the land from drainage by other wells situated outside the subject land.

her objections to the agreement, contending that she was entitled to her "full mineral interest." She argued essentially that she was entitled to an undiminished interest in the production from the two producing wells within the subject land because, under North Dakota law, all operations incident to the drilling of a well on any portion of a spacing unit, including pre-sumably production operations, "are deemed the conduct of such operations throughout the spacing unit." Correspondingly, she noted that she had repeatedly refused to recognize any interest of the United States in that production.

By letter dated September 25, 1968, BLM responded to the objections of Maude L. Slaaten. BLM took the position that the United States was entitled to royalty under the compensatory royalty agreement pursuant to which Texaco had "agreed to allocate and pay * * * certain royalty as compensation for drainage covering the interest of the United States in the [subject] land, in lieu of the Government issuing an oil and gas lease on said tract." BLM suggested that the question of royalty owed to Maude L. Slaaten under private lease ND-129-A was a "matter which she should negotiate with Texaco."

The question of compensatory royalty languished for almost 18 years until Dois D. Dallas, a petroleum engineer, filed, on behalf of Doris Slaaten, an analysis of the remaining oil and gas reservation with BLM on July 30, 1986. 2/ Dallas asserted that, after November 4, 1961, the reservation did not encompass any percentage of oil and gas production from the two producing wells but, rather, was "intended to cover 'all'

2/ During this period of time, however, BLM issued a Nov. 22, 1983, decision terminating the remaining oil and gas reservation, i.e., to the extent of 25 acres surrounding each of the subject wells, for failure to comply with certain conditions precedent to extension set forth in the May 1937 warranty deed, including required production during the preceding extension of the reservation. BLM also stated that royalties paid since the effective date of termination were due the United States and directed the payment of future royalties into an escrow account pending a final settlement. Various affected parties, including Doris Slaaten, appealed the November 1983 BLM decision to the Board, which set aside the decision on June 12, 1984 (Doris A. Slaaten, 81 IBLA 282), concluding in part that production within the unit of which the subject land was a part would satisfy the production requirement under the deed. Because of our inability to conclude whether such unit production had effectively extended the reservation, we remanded the case to BLM for such a determination. In an Oct. 19, 1984, decision, BLM concluded that unit production had satisfied the production requirement and, accordingly, revoked its November 1983 decision. For our purposes herein, however, the Board's previous decision did not specifically address the question of whether the United States acquired an interest in the oil and gas underlying the subject land upon the expiration of the initial term of the reservation and, thus, was entitled to compensatory royalty.

the 'Producing Minerals' in the NW^ of section 17" and that the 25-acre restriction applied to development of the surface only. Furthermore, in an apparent reiteration of the argument advanced earlier by Maude L. Slaaten, Dallas argued that, by virtue of designation of the spacing units covering the subject land, "all of the NW^ of section 17 is a well(s) (or mine) in production." Thus, Dallas contended that the United States was not entitled to any royalty with respect to oil and gas production within the subject land.

BLM replied to Dallas by letter dated August 8, 1986, stating that it did not agree with his analysis. BLM contended that the language of the reservation, as interpreted by Judge Register in his October 16, 1967, judgment and previous memorandum opinion in United States v. Amax Petroleum Corp., No. 712 (D. N.D.), entitled the United States to "the royalties due for the acreage involved except for those royalties accruing to the 25 acres of land around each well." In response to a subsequent request by Dallas for a legal description of the 25-acre area surrounding each of the two producing wells, BLM, in a September 17, 1986, letter, stated that the reservation was limited to 25 acres of "participation" in the production from each of the wells.

Finally, on December 5, 1986, Doris Slaaten filed a protest to the "taking by the United States * * * [of] any of the oil and income allocated to 110 acres, whether divided or undivided, in the NW^ of Section 17." She argued that there was no indication in the May 1937 warranty deed that the United States "intended to benefit in any manner in the fruits of our efforts to develop the oil and gas minerals under our land." In support of her assertion, Slaaten submitted a November 12, 1986, letter to her from Dallas in which he equated the term "well" in the phrase in the deed purportedly restricting the oil and gas reservation to 25 acres around each well to a producing unit and concluded essentially that, because Slaaten had fully developed her "two 80-acre producing units" as of the expiration of the initial term of the reservation on November 4, 1961, in compliance with the terms of that reservation, this prevented any interest of the United States from attaching. With respect to the 25 acres surrounding each well, Dallas concluded that this restriction had no application because Slaaten did not own any land surrounding the producing units.

In its January 1987 decision, BLM dismissed Slaaten's protest, stating that it had long interpreted such oil and gas reservations as excepting from the vesting of the entire oil and gas estate in the United States only the 25 acres surrounding each producing well. BLM contended that this position is supported by the district court's resolution of United States v. Amax Petroleum Corp. Otherwise, BLM argued that the 25-acre limitation would have no meaning, despite its obvious inclusion in the May 1937 warranty deed. Rather, BLM concluded that the limitation has a clear meaning which "allows no exception based on subsequent establishment of field spacing

orders larger or smaller than 25 acres." Slaaten has appealed from the January 1987 BLM decision. 3/

In her statement of reasons for appeal, appellant reiterates the arguments made in conjunction with her protest, contending that BLM failed to properly address these matters. It is apparent that appellant is still of the opinion that the United States had no interest in the subject land after November 4, 1961, because that land remained subject to the oil and gas reservation by virtue of production from the two wells. Appellant further argues that the district court's resolution of Amax Petroleum has no application because the cases are "by no means identical."

This case requires the Board to construe the language of the May 1937 warranty deed reserving a right to prospect for and exploit oil and gas to the grantors in a conveyance of the NW^ sec. 17 to the United States but providing for extensions of that right under certain conditions after November 4, 1961, and to determine whether the United States, after that date, had an interest in any oil and gas production from that land which could form the basis for the subsequent compensatory royalty agreement. 4/ Such an interest is necessarily implicit in those cases recognizing the authority of the United States to seek compensatory royalty in the event of drainage. See Nola Grace Ptasynski, 63 IBLA 240, 89 I.D. 208 (1982); Hawthorn Oil Co., 37 IBLA 91, 94 (1978); Solicitor's Opinion, 60 I.D. 201 (1948). The Board is empowered to so construe the deed. Doris A. Slaaten, supra at 285. Moreover, it is also well to note that there is no suggestion in this case that the oil and gas reservation contained in the deed is contrary to statute or otherwise void. See Phelps Dodge Corp. v. State of Arizona, State Land Department, 548 F.2d 1383 (9th Cir. 1977); McKenzie County, 99 IBLA 264 (1987).

[1] At the outset, it is clear from the language of the 1937 warranty deed that the 25-acre limitation constitutes a specific restriction on the exercise of the "exclusive right to prospect for and exploit the * * * GAS, OIL, in, under and upon the [subject] land." Thus, the limitation would extend to any activity which would constitute an exercise of that right, whether that activity occurred on or below the surface of the land. The deed clearly contemplated the disturbance of the "[s]urface and subsurface of sites of operations," which included not only the drilling and production of a well but also the construction of "[t]unnels, shafts, and other workings" as part of a mine. The fact that the 25-acre limitation does not

3/ The record indicates that Slaaten's interest in this case consists of a fractional royalty interest presumably derived from the overriding royalty interest of her mother. By virtue of that interest, she has standing to pursue this appeal.

4/ We note that 43 CFR 3120.8-3 currently provides express authority for BLM to enter into compensatory royalty agreements in lieu of leasing "where the interest of the United States in the oil and gas deposit includes both a present and a future fractional interest in the same tract containing a producing well."

constitute a limitation only on surface activity was also the conclusion of the district court as expressed at page 5 in its August 8, 1967, Memorandum and Order in United States v. Amax Petroleum Corp., supra.

We are also not persuaded that the term "well" in the language limiting the exercise of the right to 25 acres "around each well" should be accorded anything other than its ordinary meaning in the oil and gas context, in the same way we would construe the 25-acre limitation in the case of a mine. As such, the term refers to the actual results of drilling activity, i.e., the "borehole or drill hole." A Dictionary of Mining, Mineral, and Related Terms, at 1230 (1968). There is simply no basis for construing the term to mean a producing unit of land. While the reference work cited by Dallas refers to a well as a "producing unit," the term still retains its ordinary meaning. See American Institute of Mining and Metallurgical Engineers, Petroleum Conservation, 259-60 (1951). We also accord the term "around" its ordinary meaning in the context of such a fixed position as a well. Thus, the area around a well will be considered that which is "in all or various directions from a fixed point." Webster's Third New International Dictionary, at 120 (1971). In addition, because a 25-acre area by definition constitutes a square area, we could justifiably construe a 25-acre area around a well to be that area which fully surrounds a well placed directly in its center.

Having said all this, however, it is clear from a plain reading of the language of the May 1937 warranty deed that the 25-acre limitation constitutes a limitation on the exercise of the right reserved in that deed. It does not constitute a limitation on the right itself. Thus, the deed does not provide that, upon extension of the reserved right by virtue of dril-ling or production of a well within the subject land, the grantors will only be entitled to prospect for and exploit oil and gas underlying that well and the surrounding 25-acre area. Nor can we read such language into the deed. Lee E. Williamson, 48 IBLA 329, 331 (1980); Jacob N. Wasserman, 74 I.D. 173, 177 (1967). In addition, another provision of the deed is inconsistent with construction of the 25-acre language as a limitation on the right to prospect for and exploit the oil and gas. The deed provides for access to the subject land by authorized officials "during [the] term [presumably both the initial and extended term] of said right." This provision indicates that the drafters were concerned that access might otherwise be regarded as having been precluded by continuation of the right during its "term," because of the exclusive nature of the right. The provision would have been unnecessary if the 25-acre language is interpreted as limiting the extent of the right during such term.

Overall, we conclude that reading the deed as limiting the grantors' reserved right to only that oil and gas underlying any well being drilled or produced on November 4, 1961, and the surrounding 25-acre area would ultimately convey to the United States more than what can be supported by the "clear language" of the deed, contrary to the principle enunciated by the Supreme Court in United States v. Union Pacific Railroad Co., 353 U.S. 112, 116 (1957), in the context of construing land grants by the United States, which principle for the sake of fairness should be equally applicable to the construction of deeds to the United States. See also

4 H. Tiffany, The Law of Real Property | 977 (3rd ed. 1975) at 89; 6 G. Thompson, Commentaries on the Modern Law of Real Property | 3094 (1962) at 803-04; Godfrey Nordmark, 65 I.D. 299, 305 (1958); Zaskey v. Farrow, 154 P.2d 1013, 1016 (Kan. 1945). In addition, we conclude that the Slaatens' actions after execution of the May 1937 warranty deed in issuing a private oil and gas lease of indefinite duration encompassing all of the subject land is indicative that the deed was intended to provide for a reservation of the right to develop all of the oil and gas in that land for a similar indefinite period. See 6 G. Thompson, Commentaries on the Modern Law of Real Property | 3094 (1962) at 805-06.

Therefore, presuming that the condition precedent to the extension of the right is satisfied, the deed simply provides that the "right * * * shall automatically be extended." See Ethel C. Radzewicz, A-30866 (Jan. 29, 1968) at 2. That right constitutes the exclusive right to prospect for and exploit oil and gas in, under, and upon the NW^ sec. 17. There is no indication that the United States acquires any right to that oil and gas in the case of any extension after the expiration of the initial term of the reservation on November 4, 1961. Indeed, the exclusive nature of the right would necessarily preclude any other interest. See 6 G. Thompson, Commentaries on the Modern Law of Real Property, | 3096 (1962) at 817-18; Radke v. Union Pacific Railroad Co., 334 P.2d 1077, 1089-90 (Colo. 1959) (Moore, J., dissenting). Presuming that an extension has occurred, the grantors or their successor in interest retain the sole right to develop the subject land for oil and gas purposes, although the exercise of that right would be confined to the 25-acre area around the producing well.

We are not dissuaded from this position by the district court's resolution of Amax Petroleum, which decision was never appealed to the circuit court. That case, which involved an action by the United States to quiet title in a certain oil and gas interest, concerned an identical oil and gas reservation to that involved herein. In this context, we note that the court expressly held at page 2 of its October 16, 1987, Judgment in United States v. Amax Petroleum Corp., supra, that the reservation expired at the conclusion of the initial term of the reservation "except as to twenty-five acres of land around each oil and gas well" which was producing on that date and that, at that time, "title to all other minerals in the lands covered by [the] deed [including land other than the 25 acres around each producing well] became vested in the [United States]." On the basis of this holding, the court also concluded, as noted by BLM, that the United States was entitled to royalties from the wells which were producing at the expiration of the initial term of the reservation, "except for those royalties accruing to the 25 acres of land around each such well." Id. at 3. That conclusion is supported in the court's August 1967 memorandum opinion.

However, after a careful review of that opinion, we can find nothing which successfully supports the conclusion that, at the expiration of the initial term of such an oil and gas reservation, the United States becomes vested with the right to prospect for and exploit the oil and gas underlying land other than the 25 acres surrounding the producing wells and, thus, entitled to royalties for production therefrom. In particular, the court

principally relies on a decision by the district court in United States v. Leiter Minerals, Inc., 204 F. Supp. 560, 566 (E.D. La. 1962), to the extent that the court in Leiter Minerals stated, in construing a mineral reservation in a deed to the United States, that "a large area will be released from the servitude after the expiration of ten years * * *, for only 25 acres around each well are saved in any event." (Emphasis in original.) However, what the court in Amax Petroleum failed to recognize is that the deed in Leiter Minerals was not identical to the deed involved in Amax Petroleum and herein. Rather, the deed expressly provided that the "'right [to mine] so extended [by operations] shall be limited to an area of twenty-five acres of land around each well or mine producing.'" Id. at 565 (emphasis added). As noted supra, the 25-acre limitation involved in Amax Petroleum and herein applied only to the exercise of the reserved right during an extension period, and not the "right [to mine]." Compare with The Moran Corp., 101 IBLA 384, 386 (1988). The court in Amax Petroleum overlooked the fact that the reserved right was an exclusive right to pros-pect for and exploit the land for oil and gas purposes, which right was extended upon compliance with the condition precedent, and that the 25-acre limitation effective during the extension period was a limitation on the exercise of that right, rather than on the right itself. 5/ Rather, the court focused on its conclusion that the reservation did not create a separate mineral estate retained by the grantors. 6/ We are not bound to follow the decision of the district court in Amax Petroleum, and we decline to do so. Pacificorp, 95 IBLA 16, 17-18 (1986).

5/ However, the court also offered evidence which can support the position that the 25-acre limitation was intended to constitute only a limitation
on the exercise of the reserved right. Thus, the court at page 9 of its Aug. 8, 1967, Memorandum and Order in United States v. Amax Petroleum Corp., supra, noted that, in acquiring the land involved, the United States found the reservation non-objectionable because the small acreage used in connection with any wells "'would have no effect on the proposed use of the land'" and stated that the United States had, thus, determined that the "exercise of the reserved right would not adversely affect the area." However, presuming that the exercise would not have an adverse affect, as expressed in a similar context, the "'Government policy at that time was
to allow the seller to reserve the oil, gas and minerals forever.'" L.H. Tiley, A-30513 (May 4, 1966) at 7 (emphasis in original).

6/ The conclusion that production operated "to extend the reservation in its entirety," with the grantors and their successors restricted to the use of 25 acres to operate each producing well, was, indeed, regarded as "not an implausible argument," by the Field Solicitor at page 3 of a Sept. 1, 1964, letter to the U.S. Attorney proposing the institution of a quiet title action in Amax Petroleum. Rather, he recognized that the reservation could be analyzed in the same fashion as we have done here:

"The vendor reserved the exclusive 'right' to prospect for and exploit the gas and oil in the subject lands. This 'right' was reserved for 25 years--to expire on January 30, 1962. The 'right' shall be extended for five-year periods if the seller has mined minerals to commercial advantage. If the 'right' is extended, its exercise is limited to an area of 25 acres of land around each well producing on the termination date. If the 'right'

For these reasons, we conclude that so long as the oil and gas reservation created by the May 1937 warranty deed is considered to be extended by production, in accordance with the terms of the deed, the right to prospect for and exploit the oil and gas underlying the NW^ sec. 17 must be regarded as retained solely by the grantors or their successors, thus precluding any interest of the United States in the oil and gas produced from that land. BLM has already determined that the reservation has been and continues to be extended by virtue of production either within the subject land or within the unit which encompasses that land. Thus, the United States necessarily has had and continues to have no basis for claiming royalty on production from the subject land. Accordingly, we conclude that BLM, in its January 1987 decision, improperly dismissed appellant's protest challenging the collection and retention of royalty by the United States on production from the NW^ sec. 17, and the decision must be reversed. We leave it to BLM to resolve whatever ramifications result from our resolution of the case in this fashion.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

fn. 6 (continued)
is again extended, its exercise is limited to 25 acres of land around each well producing as of the next termination date. If the wells do not produce to commercial advantage for an average of 200 days per year during the preceding period, the 'right' terminates."
Id. (emphasis in original).